No. 82-2042

IN THE
Supreme Court of the United States
OCTOBER TERM, 1982

WESTINGHOUSE ELECTRIC CORPORATION,
Petitioner,

v.

CHRISTINE VAUGHN AND MARION GEE,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL

ROBERT E. WILLIAMS
DOUGLAS S. MCDOWELL
BARBARA L. NEILSON
MCGUINESS & WILLIAMS
1015 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005
(202) 789-8600

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The Equal Employment Advisory Council respectfully submits this brief amicus curiae with the written consent of the parties. Statements of consent have been submitted to the Clerk of Court. This brief seeks reversal of the decision of the United States Court of Appeals for the Eighth Circuit.

INTEREST OF THE AMICUS CURIAE

The Equal Employment Advisory Council (EEAC or the Council) is a voluntary nonprofit association organized to promote the common interest of employers and the general public in sound government policies, procedures and requirements pertaining to nondiscriminatory employment practices. Its membership

comprises a broad segment of the employer community in the United States, including both individual employers and trade and industry associations. Its governing body is a board of directors composed primarily of experts and specialists in the field of equal employment opportunity whose combined experience gives the Council a unique depth of understanding of the practical and legal considerations relevant to the proper interpretation and application of EEO policies and requirements. The members of EEAC are firmly committed to the principle of nondiscrimination and equal employment opportunity.

Substantially all of EEAC's members, or their constituents, are subject to the provisions of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e through 2000e-17 (1976 & Supp. V 1982) (Title VII). The Council thus has a direct interest in the allocation of the burden of proof and the use of statistical evidence in cases arising under Title VII. Because of this interest, EEAC has participated as amicus curiae in a number of cases in this Court involving those issues. *See, e.g., United States Postal Service Board of Governors v. Aikens*, 103 S.Ct. 1478 (1983); *Connecticut v. Teal*, 457 U.S. 440 (1982); *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *Furnco Construction Corp. v. Waters*, 438 U.S. 567 (1978); and *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977).

This appeal offers the Court an opportunity to clarify the proper method for determining whether a legitimate, nondiscriminatory reason for an adverse employment action constitutes a mere pretext for discrimination in a Title VII individual disparate treat-

ment action. In this case, Westinghouse established that the plaintiff's poor work record provided a legitimate basis for her discharge. Of particular concern to the members of EEAC is that the district court allowed this specific evidence to be offset by broad, generalized evidence concerning the representation of blacks in the employer's work force and the company's alleged treatment of blacks other than the plaintiff, even though the generalized evidence was not linked to the particular conduct challenged in the suit nor was it the basis of an independent charge of discrimination.

STATEMENT OF THE CASE

The plaintiff, a black female employee of Westinghouse Electric Corporation, was hired in July 1970 as a sealex machine operator. She was transferred to the second shift in November 1970, and to the third shift in January 1971. At the time Ms. Vaughn was transferred from the second shift, her shift supervisor, Mr. Brazil, evaluated her quantity and quality of production as poor and recommended that she not be rehired in that position. After her transfer, her supervisor on the third shift, Mr. Turnage, warned her five times that her production was unacceptable. On April 19, 1971, Ms. Vaughn was disqualified from her position as a sealex machine operator and placed in a lower paying position as a bulb loader. The disqualification form stated that, while Ms. Vaughn got along well with others and had good attendance, the quality and quantity of her work as a sealex operator were poor, she showed no interest in the job, and her supervisor was unable to motivate her.

Ms. Vaughn filed the present action under Title VII of the Civil Rights Act of 1964, as amended, alleging among other things that she was disqualified

from the sealex position because of her race. After a trial, the district court dismissed the claims of the two other plaintiffs and found against Ms. Vaughn on all of her claims except the disqualification allegation. *Vaughn v. Westinghouse Electric Corp.*, 471 F. Supp. 281 (E.D. Ark. 1979). The court held that the plaintiffs had established a prima facie case of racial discrimination based upon: (a) statistical evidence relating to the low representation of blacks in non-production jobs and the hiring of black and white applicants, combined with (b) the testimony of a black former employee concerning instances of discriminatory treatment of black employees other than the plaintiffs, and (c) proof that Ms. Vaughn had held the sealex position, was disqualified, and was replaced by a white employee. *Id.* at 286, 288-90. The district court held that Westinghouse had not "borne its burden of proving that [Ms. Vaughn's] disqualification was not motivated in substantial part by racial reasons" and thus had not "overcome plaintiff's prima facie case . . . ." *Id.* at 289-90.

The Court of Appeals for the Eighth Circuit affirmed the district court decision. *Vaughn v. Westinghouse Electric Corp.*, 620 F.2d 655 (8th Cir. 1980). Judge Gibson, in a dissenting opinion, concluded that Westinghouse had shown by a preponderance of the evidence that a legitimate reason for the disqualification existed and would have remanded in order to afford Ms. Vaughn an opportunity to show that the reason was a pretext for illegal discrimination. *Id.* at 661, 662 (Gibson, J., dissenting).

On March 9, 1981, this Court vacated the judgment and remanded the case to the Court of Appeals for further consideration in light of *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248

(1981). *Westinghouse Electric Corp. v. Vaughn*, 450 U.S. 972 (1981). The Court of Appeals, in turn, remanded the case to the trial court with directions to reconsider in light of *Burdine*. *Vaughn v. Westinghouse Electric Corp.*, 646 F.2d 335 (8th Cir. 1981).

On remand, the district court reaffirmed its earlier judgment for the plaintiff. *Vaughn v. Westinghouse Electric Corp.*, 523 F. Supp. 368 (E.D. Ark. 1981). Although the court conceded that it had erred in requiring Westinghouse to show by a preponderance of the evidence that the disqualification was in fact motivated by Ms. Vaughn's poor performance, the court held that "plaintiff was disqualified in part because of her race." *Id.* at 370, 371. The court found that Westinghouse had articulated a legitimate, nondiscriminatory reason for the plaintiff's disqualification, acknowledged that "plaintiff's job performance did leave something to be desired," and noted that "[i]f the issue were narrowly confined to evidence bearing directly on the decision to disqualify the plaintiff, there is no question that defendant would prevail." *Id.* at 371, 370. However, when the court placed the disqualification decision "in the broader context of defendant's actions over a substantial period of time," the court was "persuaded that plaintiff's race was more likely than not one of the factors that contributed substantially to defendant's decision." *Id.* at 370, 371. The court based its finding of pretext largely upon the generalized evidence concerning the representation and treatment of blacks in the company's workforce.

In a two-to-one decision, the United States Court of Appeals for the Eighth Circuit held that the district court's finding of pretext was not clearly erroneous. *Vaughn v. Westinghouse Electric Corp.*, 702

F.2d 137 (8th Cir. 1983). Judge Fagg, dissenting, would have reversed the judgment because the plaintiff failed to meet her burden of proving pretext by a preponderance of the evidence, and quoted with approval Judge Gibson's earlier observation that "[t]he facts are devoid of any connotation whatsoever of racial discrimination." *Id.* at 139-40, 141 (Fagg, J., dissenting).

SUMMARY OF ARGUMENT

The district court erred when it accorded generalized statistical and anecdotal evidence conclusive weight in reaching a decision during the pretext stage of this Title VII individual disparate treatment case. Because proof of discriminatory motive is required for the plaintiff to prevail, general statistics concerning the representation of blacks in an employer's work force and general testimony about the treatment of members of the protected class other than the plaintiff are of minimal importance. Such evidence may, in addition to other evidence, serve to satisfy the plaintiff's initial burden of proving a prima facie case of discrimination, and may be considered by the court on the issue of whether the employer's proffered explanation is pretextual. It is clear, however, that general work force statistics and, by analogy, other evidence which does not focus on the particular conduct in issue in the law suit may not be, in and of itself, controlling in an action challenging an employment decision relating to an individual, especially when the employer has proven other legitimate reasons for the decision.

The district court's decision, by allowing general evidence unrelated to the particular claim to constitute conclusive proof of pretext, would negate the requirement that discriminatory intent be proven in

disparate treatment cases. Instead, the decision below would allow an individual to prevail based upon a general reference to minority work force representation which, in and of itself, might be insufficient to establish even a prima facie case of disparate impact or treatment. If a court could rely on the general evidence presented in the case to find pretext even if the employer proves (and the court agrees) that the plaintiff performed poorly compared to other employees, then Title VII's established burden of proof requirements would be undermined.

Moreover, according conclusive weight to generalized evidence which is unrelated to the particular employment decision which is the subject of the plaintiff's law suit ignores this Court's instruction in *Burdine* that the factual inquiry must achieve "a new level of specificity" during the court's analysis of proof of pretext. The Court's decision clearly contemplated that, once an employer has proffered a legitimate, nondiscriminatory reason for an adverse action, the plaintiff may prove pretext only if he or she discredits this reason through proof which was sufficiently related to the particular conduct challenged in the suit and was responsive to the employer's asserted reason for the adverse action. The federal courts of appeals have long viewed generalized work force statistics as lacking in probative force at the pretext stage if they are not sufficiently related to the specific employment decision which is the focus of the individual's suit in a disparate treatment case. This is particularly the case when the employer's reason addresses the plaintiff's qualifications, which comprise one of the elements of the plaintiff's prima facie proof.

Finally, it is manifest that an employer's use of a production standard which is based upon objective,

observable factors may not support a finding of pretext in the absence of any evidence that the standard has been applied unfairly or has masked discrimination. Employers have the discretion to implement business judgments for any reason which is not discriminatory. Even the use of wholly subjective criteria as the basis for employment decisions violates Title VII only if the criteria were used to disguise discrimination. The production criteria used in the instant case were based upon objective, observable factors and thus could not be faulted for being likely to foster discrimination. In any case, the record is devoid of *any* evidence which would suggest that the production standard was applied unfairly. In the absence of such evidence and given the warnings of poor performance which were received by the plaintiff as well as the assistance provided to improve her performance, it was improper for the court to accord any weight to the mere fact that the production standard was not communicated to sealex operators.

ARGUMENT

THE DISTRICT COURT ERRED IN FINDING THAT DEFENDANT'S LEGITIMATE, NONDISCRIMINATORY REASON FOR DISQUALIFYING THE PLAINTIFF WAS A MERE PRETEXT FOR ILLEGAL DISCRIMINATION.

In order to evaluate the propriety of the decision of the lower courts, it is important to place this suit in its proper analytical framework. This Court has recognized that two basic theories of discrimination may be used to establish a violation of Title VII. The elements of proof are different under each theory. The "disparate impact" theory is utilized to challenge employment criteria that, although facially neutral, have a substantial adverse impact on applicants or employees in a protected class and cannot be justified by business necessity. *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977). The focus in such cases is on the *consequences* of employment policies, rather than the employer's motivation. *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971). Statistical proof demonstrating adverse impact is "almost totally determinative" in disparate impact actions. B. Schlei & P. Grossman, *Employment Discrimination Law* 1287 (2d ed. 1983).

In contrast, the "disparate treatment" theory requires a showing that an employer has treated some individuals less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is of paramount importance in a disparate treatment claim. *Teamsters*, 431 U.S. at 335 n.15.

The district court acknowledged in its second opinion in the present case that "[t]his is only an individual action challenging a single employee's disqual-

ification and transfer to a lesser-paying job." 523 F. Supp. at 370. Despite the limited probative value of work force statistics (and, by analogy, general testimonial evidence regarding the treatment of blacks other than the plaintiff) in reaching an ultimate finding of intentional discrimination in an individual disparate treatment case, the court below largely relied on such evidence in reaching its finding of pretext.[1] As the following discussion explains, the district court erred in attaching great weight to such generalized evidence during the pretext stage of an individual disparate treatment case.

I. In an Individual Disparate Treatment Case, Generalized Statistical Evidence of a Disparity in the Representation of the Protected Class in the Employer's Work Force and Anecdotal Evidence Regarding the Employer's Treatment of Members of the Protected Class Other than the Plaintiff Are Insufficient to Support a Finding of Pretext if Such Evidence Is Not Linked to the Particular Conduct in Issue.

A. *The decisions of this Court recognize that specific evidence stating an employer's defense ordinarily cannot be overridden by generalized evidence that supported the prima facie case.*

The decisions of this Court clarify that, in an individual disparate treatment case, "[t]he ultimate

[1] The only other evidence relied upon by the district court was the satisfactory rating given by the plaintiff's second-shift supervisor (easily overcome by the critical evaluation issued by the same supervisor later and irrelevant in any case to her disqualification by the third-shift supervisor), the fact that the plaintiff received progressive pay increases in the sealex position, and the lack of communicated objective performance standards (discussed at 24-27, *infra*), all of whieh would be insufficient in themselves to show that plaintiff's documented performance problems were a mere pretext for discrimination.

burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981). However, a division of intermediate evidentiary burdens has been applied in Title VII individual disparate treatment cases in order to "progressively . . . sharpen the inquiry into the elusive factual question of intentional discrimination." *Id.* at 255 n.8.

In *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), the Court held that an individual plaintiff must carry the initial burden of establishing a prima facie case of disparate treatment under Title VII.[2] This burden is "not onerous," *Burdine*, 450 U.S. at 253, but is merely intended to force the plaintiff to "demonstrate at least that his rejection did not result from the two most common legitimate reasons on which an employer might rely to reject a job applicant: an absolute or relative lack of qualifications or the absence of a vacancy in the job sought." *Teamsters*, 431 U.S. at 358 n.44. Establishment of a prima

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[2] Under the *McDonnell Douglas* formula, a plaintiff who alleges discrimination in hiring must show:

> (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

411 U.S. at 802 (footnote omitted). The Court indicated that varying factual circumstances may require flexible application of this formula. *Id.* at n.13; *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978).

facie case creates a rebuttable presumption that the employer discriminated against the plaintiff, *Burdine*, 450 U.S. at 254 & n.7, but must *not* be equated with an ultimate factual finding of discriminatory treatment, *Furnco Construction Co. v. Waters*, 438 U.S. 567, 579 (1978).

In class actions alleging disparate treatment, in which a "pattern and practice" of disparate treatment is alleged, the plaintiffs' "initial burden is to demonstrate that unlawful discrimination has been a regular procedure or policy followed by an employer . . . ." *Teamsters*, 431 U.S. at 360. In such cases, statistical evidence is of great importance and, "[w]here gross statistical disparities can be shown, they alone may in a proper case constitute *prima facie* proof of a pattern or practice of discrimination." *Hazelwood School District v. United States*, 433 U.S. 299, 307-08 (1977). *See also Teamsters*, 431 U.S. at 339. However, a number of courts have viewed generalized statistical evidence with skepticism as a means for establishing even a prima facie case of disparate treatment in a class action case. *See, e.g., EEOC v. Federal Reserve Bank*, 698 F.2d 633, 645-64 (6th Cir. 1983), *cert. granted on other grounds*, 52 U.S.L.W. 3342 (U.S. Nov. 1, 1983) (No. 83-185), and *Pouncy v. Prudential Insurance Co. of America*, 668 F.2d 795, 801-02 (5th Cir. 1982). Because broad-based statistics include a number of people who cannot be realistically compared to the complaining class, they are "virtually irrelevant" for comparison purposes. *New York City Transit Authority v. Beazer*, 440 U.S. 568, 586 (1979). Moreover, the courts have recognized that, where the statistics are relevant, they must be at least "significantly discriminatory" or statistically significant to

be legally cognizable. *Dothard v. Rawlinson*, 433 U.S. 321, 329 (1977); *Hazelwood*, 433 U.S. at 308 n.14.

The requirement that there be appropriate comparative data yielding statistically significant differences in order to establish a prima facie case is even more critical in individual disparate treatment cases, which turn on individual facts and circumstances. Moreover, as discussed below, this standard is and should be applied more rigorously at the pretext stage of proof where the factual inquiry proceeds to a new level of specificity.

Upon the establishment of a prima facie case, the burden of production shifts to the employer to rebut the inference of discrimination by articulating a legitimate, nondiscriminatory reason for the employment action challenged by the plaintiff. *Burdine*, 450 U.S. at 254; *Furnco*, 428 U.S. at 577-78; *McDonnell Douglas*, 411 U.S. at 802. It is not necessary for the employer to prove the absence of a discriminatory motive in order to rebut the prima facie case, *Board of Trustees v. Sweeney*, 439 U.S. 24, 25 (1978); the employer's evidence merely must raise "a genuine issue of fact as to whether it discriminated against the plaintiff." *Burdine*, 450 U.S. at 254-55. Shifting the burden of production to the employer serves "to frame the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext." *Id.* at 255-56.

If the employer carries its burden of production, "*the presumption raised by the prima facie case is rebutted, and the factual inquiry proceeds to a new level of specificity.*" *Id.* at 255 (emphasis added). Although the presumption raised by the prima facie case "drops from the case" at this point, the court may consider evidence previously introduced by the

plaintiff to establish a prima facie case and inferences properly drawn therefrom on the issue of whether the defendant's explanation is pretextual. *Id.* at 255 n.10. The Court in *Burdine* further explained:

> The plaintiff retains the burden of persuasion. She now must have the opportunity to demonstrate that the proffered reason was not the true reason for the employment decision. *This burden now merges with the ultimate burden of persuading the court that she has been the victim of intentional discrimination.* She may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence.

Id. at 256 (emphasis added). At this stage, therefore, the court "must decide which party's explanation of the employer's motivation it believes." *United States Postal Service Board of Governors v. Aikens*, 103 S.Ct. 1478, 1482 (1983).

The *McDonnell Douglas* decision noted that evidence which "*may be relevant* to any showing of pretext includes facts as to . . . petitioner's general policy and practice with respect to minority employment. On the latter point, statistics as to petitioner's employment policy and practice *may be helpful* to a determination of whether petitioner's refusal to rehire respondent in this case conformed to a general pattern of discrimination against blacks." 411 U.S. at 804-05 (emphasis added). But, as the Court made clear, generalized evidence which has no direct bearing on the particular employment practice of which the plaintiff complains usually cannot be used to override specific evidence submitted by the employer. This

is particularly the case when the employer's reason directly addresses the plaintiff's qualifications, which comprise one of the essential elements of the plaintiff's prima facie case. Thus, the Court stated:

> The District Court may, for example, determine, after reasonable discovery that "the [racial] composition of defendant's labor force is itself reflective of restrictive or exclusionary practices." See Blumrosen, *supra*, at 92. *We caution that such general determinations, while helpful, may not be in and of themselves controlling as to an individualized hiring decision, particularly in the presence of an otherwise justifiable reason for refusing to rehire.*

Id. at 805 n.19 (emphasis added). *Accord Furnco*, 438 U.S. at 580 (although "the District Court was entitled to *consider* the racial mix of the work force when trying to make the determination as to motivation," "such proof neither was nor could have been sufficient to *conclusively* demonstrate that Furnco's actions were not discriminatorily motivated") (emphasis in original).

The district court in the present case found that Westinghouse's asserted reasons for discharging Ms. Vaughn were pretextual even though there was "no reason to disbelieve any of" the testimony of the plaintiff's supervisor concerning problems with the plaintiff's performance, there was "virtually no direct evidence of unlawful motivation" on the supervisor's part, "the burnt wires documented by defendant in fact existed," "production problems were a genuine concern," and "no proof was offered to the effect that a white person with a work record comparable to Ms. Vaughn's was kept on the job." 523

F. Supp. at 370-71, 371 n.5. The conclusion is inescapable that the lower court gave conclusive effect to the plaintiff's evidence relating to "the broader context of defendant's actions over a substantial period of time," 523 F. Supp. at 370, i.e., the work force statistics and the testimony of Ms. Donley concerning the general treatment of other black employees, in reaching its decision that the company intentionally discriminated against the plaintiff.[3] This was error, for the reasons explained below.

B. *The decisions below negate the distinction between disparate treatment and disparate impact cases.*

This Court's decision in *Burdine* indicates that, if an employer carries its burden of production by articulating a legitimate, nondiscriminatory reason for an adverse action, "the presumption raised by the prima facie case is rebutted . . . ." 450 U.S. at 255. If the district court decision in the instant case is allowed to stand, however, general, unrefined evidence of disparities in the representation of blacks in the work force (often introduced by Title VII plaintiffs in satisfying their burden of establishing a prima facie case) would be permitted to assume overwhelming importance in the determination of pretext even if the general evidence is not linked to the particular conduct in issue. Such an approach would allow an unqualified plaintiff in an individual disparate treat-

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[3] The only specific evidence introduced by the plaintiff which arguably attempted to discredit the company's rebuttal evidence was the satisfactory rating given by the plaintiff's second shift supervisor. This evidence is irrelevant when one considers Westinghouse's unrefuted evidence of Ms. Vaughn's performance problems after her transfer to the third shift.

ment action to prevail based upon a showing of adverse impact alone, thereby blurring the distinction between disparate impact and disparate treatment cases and undermining the requirement that discriminatory *intent* be shown in disparate treatment cases. *Cf. Clark v. Huntsville City Board of Education*, 717 F.2d 525, 529 (11th Cir. 1983) (a court "may not circumvent the intent requirement of the plaintiff's ultimate burden of persuasion by couching its conclusion in terms of pretext").

C. *The evidence produced below was not probative of the employer's alleged disparate treatment of the plaintiff.*

According conclusive weight to generalized evidence which is unrelated to the particular disqualification challenged by the plaintiff also ignores *Burdine's* mandate that "the factual inquiry [proceed] to a new level of specificity" during the court's analysis of proof of pretext. 450 U.S. at 255. The Court's decision in *Burdine* clearly contemplated that, once an employer has proffered a legitimate, nondiscriminatory reason for an adverse action, the plaintiff may prove pretext only if he or she rebuts this reason through proof which is sufficiently related to the particular conduct challenged in the suit and responsive to the employer's asserted reason for the adverse action.

In the present case, the only inquiry which was relevant at the pretext stage was whether or not Westinghouse intentionally discriminated against the plaintiff when it disqualified her from the sealex job. Thus, Ms. Vaughn could perhaps have established

pretext through the introduction of evidence which supported an inference of discrimination by, for example, comparing the disqualification rates of black and white production or sealex workers, comparing the production rates of white employees who remained in their positions and black employees who were disqualified or, best of all, comparing her performance with that of similarly situated white employees who were not disqualified. Such evidence at least would have been probative on the issue of the company's discriminatory animus and thus highly relevant to a determination of pretext.

However, the plaintiff did not (or perhaps could not) introduce such specifically-tailored evidence. Even though the plaintiff had not alleged in her complaint that Westinghouse had discriminated against blacks generally or that the company's hiring or promotion practices were discriminatory, she relied upon broad statistical and anecdotal evidence relating to these employment practices without showing in any way that such evidence was relevant to her disqualification from the sealex position. At the pretext stage, prima facie evidence "must be given 'whatever weight and credence it deserves' *in light of the defendant's rebuttal evidence.*" *Wells v. Gotfredson Motor Co.*, 709 F.2d 493, 496 n.1 (8th Cir. 1983), *quoting Aikens*, 103 S.Ct. at 1481 n.3 (emphasis added). Because the plaintiff did not produce any proof which was specifically related to the challenged disqualification and thereby discredited the legitimate, nondiscriminatory reason proffered by Westinghouse, the district court's finding of pretext is inconsistent with *Burdine* and must be overturned.

D. *Federal court decisions overwhelmingly hold that the types of statistical evidence relied upon below cannot provide the basis for establishing an individual disparate treatment case.*

An interpretation of *Burdine* which requires that the plaintiff produce evidence which focuses on the particular conduct in issue and the particular reason proffered by the employer in order to demonstrate pretext is also consistent with federal court decisions under Title VII. These cases clarify that "statistics alone will not suffice to prove pretext in individual disparate treatment cases" and that "[t]he probative value of any statistical evidence offered in [individual] disparate treatment cases will depend upon its relevance to the conduct in question." B. Schlei & P. Grossman, Employment Discrimination Law 1316 & n.72 (2d ed. 1983). It is well-established among the federal courts of appeals that generalized work force statistics cannot prove pretext in the absence of a correlation to the particular conduct challenged by the plaintiff. Thus, in *Bauer v. Bailar*, 647 F.2d 1037 (10th Cir. 1981), the district court rejected the plaintiff's attempt to prove that the employer's refusal to promote her was pretextual by statistical evidence of the historical underrepresentation of women among the company's supervisory personnel. On appeal, the plaintiff argued that the district court should have given more weight to her statistical evidence. The United States Court of Appeals disagreed:

> The significance of statistical evidence in any given case depends on all the surrounding facts and circumstances. *International Brotherhood of Teamsters v. United States, supra*, 431 U.S. at 340, 97 S.Ct. at 1856. Statistical evidence should be closely related to the issues in the case.

> *Taylor v. Safeway Stores, Inc.*, 524 F.2d 263 (10th Cir. 1975) . . . . Even statistics which show prolonged and marked imbalance [in an employer's work force] may not be controlling in an individual discrimination case where a legitimate reason for the employer's action is present. *McDonnell Douglas Corp. v. Green*, *supra* 411 U.S. at 805, n.19, 93 S.Ct. at 1826 n.19.
>
> The statistical evidence presented by plaintiff in this action does not furnish any support for an inference that defendants engaged generally in discrimination against females in promotion. . . . To draw an inference of discrimination from the statistics alone would be to require perfect balance between the proportion of female employees and the proportion of female supervisors. The law does not require this. The real question is whether the 1975 promotions, and those promotions alone, involved discrimination on the basis of sex. The trial court focused on this question, giving no express consideration to plaintiff's statistical evidence. We cannot conclude that this omission was plain error . . . .

Id. at 1045.

Similarly, the United States Court of Appeals for the Eighth Circuit has held that, without additional evidence, the connection between statistics concerning the number of blacks employed as millwrights and carpenters and an individual plaintiff's discharge "is too attenuated to compel a finding of [racially discriminatory] motive." *Person v. J. S. Alberici Construction Co.*, 640 F.2d 916, 919 (8th Cir. 1981). *Accord Johnson v. Bunny Bread Co.*, 646 F.2d 1250, 1255 (8th Cir. 1981) (in light of evidence of legitimate reasons for discharge of the plaintiffs and the

fact that plaintiffs introduced no evidence to the contrary, generalized statistics showing the number of blacks discharged and black representation in the company's work force were insufficient to carry plaintiffs' burden of establishing pretext because connection between these statistics and the discharges was "too attenuated").

Several other recent cases further demonstrate the very limited probative value of generalized statistical evidence at the pretext stage. In *Woodard v. Lehman*, 717 F.2d 909, 913 n.5 (4th Cir. 1983), the court found that the plaintiff's evidence comparing the racial composition of employer's work force with general area population "plainly was not pertinent to charges of individual acts of discrimination [in promotions] against employees already employed." The court thus held that the district court did not err in dismissing such statistical evidence as irrelevant in reaching its conclusion regarding pretext. The Seventh Circuit, employing a similar analysis, recently held that, although the trial court technically erred in refusing to consider plaintiff's statistical ethnic profile of the employer's management and its workforce, this error was insignificant because the evidence could not have assisted in the establishment of a discriminatory motive. *Soria v. Ozinga Bros.*, 704 F.2d 990 (7th Cir. 1983). The court emphasized that the plaintiff's expert had admitted that he had no basis for linking the company's disciplinary procedures, which were challenged by the plaintiff as discriminatory, with the statistics relating to the company's hiring or promotion process. Finally, in *Smithers v. Bailar*, 629 F.2d 892, 899 (3d Cir. 1980), the appellate court determined that the plaintiff's statistics were of no help in proving that the employer's evi-

dence of nondiscriminatory reasons for failure to promote the plaintiff was a pretext because the statistics "fail[ed] to bear a sufficient relationship to the conduct at issue." [4]

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[4] *See also Talley v. United States Postal Service*, 33 Fair Empl. Prac. Cas. (BNA) 361, 363 (8th Cir. 1983) (plaintiff's statistical proof was "overbroad and generalized" and did not necessitate a finding of pretext in an individual disparate treatment case); *Cross v. United States Postal Service*, 639 F.2d 409, 414 (8th Cir. 1981) (evidence of Postal Service's treatment of other minority individuals, specifically the fact that 21 of 38 persons in particular jobs were nonwhite, did not serve to rebut plaintiff's evidence of discrimination); *Terrell v. Feldstein Co.*, 468 F.2d 910, 911 (5th Cir. 1972) (statistics are not determinative of an employer's reason for an action taken against the plaintiff in an individual disparate treatment case; record contained ample evidence to support the conclusion that plaintiff was discharged for nondiscriminatory reasons); *United States v. Hayes Int'l Corp.*, 456 F.2d 112, 120 (5th Cir. 1972) ("lopsided ratios [in statistical compilations] are not conclusive proof of past or present discriminatory hiring practices"); *Murphy v. Middletown Enlarged City School Dist.*, 525 F. Supp. 678, 692-93 (S.D.N.Y. 1981) (statistics comparing percentages of minority students with minority teachers, percentages of male and female teachers, and percentages of black school administrators with total black work force of county and total school administrative work force in state do not prove pretext in denial of promotion to a single black teacher); *Metcalf v. Omaha Steel Castings Co.*, 507 F. Supp. 679, 689 (D. Neb. 1981) (where statistical evidence regarding representation of blacks in company's work force did not pertain to company's treatment of employees who, like plaintiff, had complained of sickness, figures were too inconclusive to prove pretext, particularly in presence of otherwise justifiable reason for discharge); *Osborne v. Cleland*, 468 F. Supp. 1302, 1303-04 (E.D. Ark. 1979), *aff'd*, 620 F.2d 195 (8th Cir. 1980) (statistical evidence failed to establish pretext where statistical proof compared presence of blacks in higher grade supervisory jobs with presence in general population and plaintiff merely complained of discrimination in discharge);

Relevant Supreme Court and federal appeals court precedent thus establishes that, although a court may take generalized prima facie evidence into account when it is determining whether there has been adequate proof of pretext, generalized work force statistics and, by analogy, general testimony concerning the treatment of other members of the protected class cannot be given conclusive effect in an individual disparate treatment case. The plaintiff must introduce evidence which relates more specifically to the conduct in issue in order to prove that the legitimate, nondiscriminatory reasons proffered by an employer are a mere pretext for discrimination. Because the plaintiff in the present case did not produce specific evidence pertaining to her disqualification which discredited the employer's evidence of performance problems, the district court erred in finding pretext.

E. *The burden of proof scheme developed under Title VII cannot be interpreted as a shield for a proven unproductive employee.*

Allowing general, unrelated evidence of a disparity in the representation of blacks in a company's work force introduced in support of a prima facie case of individual disparate treatment to constitute conclusive proof of pretext would negate the requirement that discriminatory motive be shown in disparate treatment cases and, in effect, *prevent* an employer from taking an adverse action against an unproductive member of a protected class without subjecting itself to Title VII liability.

Weaden v. American Cyanamid Co., 14 Fair Empl. Prac. Cas. (BNA) 533, 535 (N.D. Fla. 1976) (statistical comparison which failed to focus on blacks who, like plaintiff, were rejected after medical exam is not probative in individual disparate treatment case).

Pursuant to the district court's analysis, if an employee within a protected class introduces as part of his or her prima facie case evidence tending to show that that protected class is underrepresented in particular job categories or in the company's work force as a whole, the court could rely on that general evidence to find pretext even if the employer *proves* that the plaintiff performed poorly, the plaintiff fails to discredit this reason through specific, relevant evidence (either direct or indirect), and the court agrees that performance problems in fact existed. But, just as "[i]t is clear beyond cavil that the obligation imposed by Title VII is to provide an equal opportunity for *each* applicant regardless of race without regard to whether members of the applicant's race are already proportionately represented in the work force," *Furnco*, 438 U.S. at 579, it is also clear that Title VII should not be utilized as "an automatic shield for every black employee who claims unfair treatment," *Vaughn v. Westinghouse Electric Corp.*, 620 F.2d at 287, by allowing disparities in the representation of the protected class in the employer's work force to prevent the justifiable disqualification of a member of the protected class.

II. An Employer's Use of a Production Standard Which Is Based Upon Objective, Observable Factors May Not Contribute to a Finding of Pretext in the Absence of Evidence that the Standard Has Been Used to Disguise Discrimination.

The district court acknowledged in the case at bar that "the absence of objective criteria cannot be legally dispositive." The court admitted, however, that it may have reached a different decision in the case "[i]f defendant had set a numerical standard of production, communicated it to its employees, and

enforced it uniformly . . . ." 523 F. Supp. at 371 & n.4. It is not entirely clear whether the court considered the sealex performance standards to be "subjective" or whether the court merely was critical of the company's failure to communicate an objective standard to its employees.[5] In either case, there is no justification for the district court to have accorded *any* weight to the lack of a communicated production standard in its determination of pretext.

It is well settled that Title VII does not prohibit employers from making subjective business judgments or from making decisions for any reason that is not discriminatory. Title VII was not meant to "diminish traditional management prerogatives." *United Steelworkers v. Weber*, 443 U.S. 193, 207 (1979). Thus, an "employer has discretion to choose among equally qualified candidates, provided the decision is not based upon unlawful criteria." *Burdine*, 450 U.S. at 259. The proper focus is on the employer's motivation and not on its business judgment. *See Loeb v. Textron, Inc.*, 600 F.2d 1003, 1012 n.6 (1st Cir. 1979).

It is not unlawful *per se* for an employer to use even wholly subjective criteria in making employment decisions. B. Schlei & P. Grossman, Employment Discrimination Law 191 (2d ed. 1983); *see, e.g., Brooks*

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[5] The district court found in its first decision that Westinghouse's supervisors had numerical standards to judge performance, 471 F. Supp. at 290, but apparently faulted Westinghouse for failing to communicate these standards to its employees. However, Ms. Vaughn certainly received fair notice of her failure to meet sealex production standards. Westinghouse established that she was warned about her production problems on five occasions and was told that her rate of burnt wires was much higher than that of the other sealex operators. *See* 702 F.2d at 140 (Fagg, J., dissenting).

v. Ashtabula County Welfare Department, 717 F.2d 263, 267 (6th Cir. 1983); *Bauer v. Bailar*, 647 F.2d 1037, 1046 (10th Cir. 1981); *Rogers v. International Paper Co.*, 510 F.2d 1340, 1345 (8th Cir.), *vacated and remanded on another issue*, 423 U.S. 809 (1975). Title VII "comes into play *only when such practices result in discrimination.*" *Hester v. Southern Railway*, 497 F.2d 1374, 1381 (5th Cir. 1974) (emphasis added). The issue in each case is "whether the subjective criteria were used to disguise discriminatory action." *Ramirez v. Hofheinz*, 619 F.2d 442, 446 (5th Cir. 1980).

Moreover, the production criteria relied upon by Westinghouse in disqualifying the plaintiff were based upon an objective, observable factor—the rate of burnt wires—and thus differ dramatically from the types of criteria which have been held to have been used to disguise discriminatory action.[6] In the present case, as in *Markey v. Tenneco Oil Co.*, 439 F. Supp.

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[6] *See, e.g., Crawford v. Western Electric Co.*, 614 F.2d 1300, 1315-17 (5th Cir. 1980) (a criterion for evaluation of hourly personnel simply referring to "skill" which was not based on any written evaluation or articulated standard was dependent on highly subjective elements and, in combination with statistics and racial incidents, raised inference that whites were treated more favorably in promotions); *Parson v. Kaiser Aluminum & Chem. Corp.*, 575 F.2d 1374, 1386 (5th Cir. 1978), *cert. denied*, 441 U.S. 968 (1979) (complete subjectivity likely where evaluation method placed undue reliance on general character traits); and *Mistretta v. Sandia Corp.*, 15 Fair Empl. Prac. Cas. (BNA) 1690, 1711 (D.N.M. 1977), *aff'd in relevant part*, 639 F.2d 588 (10th Cir. 1980) (evaluations were excessively subjective where they were "not based on any definite, identifiable criteria based on quality or quantity of work or specific performances that were supported by some kind of record").

219, 225 (E.D. La. 1977), *aff'd in part and rev'd and remanded in part on other grounds*, 635 F.2d 497 (5th Cir. 1981), the production standard used was "susceptible to fairly objective ascertainment." It thus cannot be viewed as being likely to foster discrimination by "leav[ing] ample room for the operation of . . . bias." *Stallings v. Container Corp.*, 75 F.R.D. 511, 521 (D. Del. 1977).

In any case, the record is devoid of any evidence which would support even an inference that the production standards employed by Westinghouse were applied unfairly or in any way masked discrimination. The plaintiff did not produce any evidence that black employees were disqualified more often than white employees, nor did she point to a single white employee with a similar record of burnt wires who had been retained as a sealex operator. In the absence of any direct or indirect evidence that the sealex production standard was used as a pretext to discriminate against the plaintiff, it was error for the court to accord weight to the lack of a publicized standard.

CONCLUSION

For the foregoing reasons, the Amicus respectfully urges that the decision of the appellate court be reversed with instructions to enter judgment for the defendant, Westinghouse Electric Corporation.

Respectfully submitted,

ROBERT E. WILLIAMS
DOUGLAS S. MCDOWELL
BARBARA L. NEILSON
MCGUINESS & WILLIAMS
1015 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005
(202) 789-8600

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